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A TREASURED INSTITUTION, A TROUBLED IDENTITY, AND THE THREAT OF DENOTATION: WHETHER THE SMITHSONIAN INSTITUTION IS AN EXECUTIVE AGENCY UNDER 5 U.S.C. § 105 AND WHY IT MATTERS

Nicole Picard⁺

Bequeathed to the United States in 1826 by James Smithson,¹ governed by statute,² and aimed at the “increase and diffusion of knowledge,”³ the Smithsonian Institution (“Smithsonian” or “Institution”) has become a well-respected, oft-visited, world-renowned collection of museums and research centers.⁴ Despite boasting an expansive and unique collection of “more than 137 million artifacts, works of art and scientific specimen,”⁵ this self-proclaimed “steward to our nation’s historic, scientific, artistic and cultural heritage”⁶ exists beneath a cloud of denotative uncertainty.

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1. See Samuel Pierpont Langley, *James Smithson*, in *THE SMITHSONIAN INSTITUTION, 1846–1896: THE HISTORY OF ITS FIRST HALF CENTURY* 1, 19 (George Brown Goode ed., 1897) (noting that James Smithson established his will on October 23, 1826). This will devised to his nephew, for life, all of Smithson’s possessions, but provided that

[i]n the case of the death of my said Nephew without leaving a child or children, or the death of the child or children he may have had under the age of twenty-one years or intestate, I then bequeath the whole of my property . . . to the United States of America, to [be] found at Washington, under the name of the Smithsonian Institution, an Establishment for the increase & diffusion of knowledge among men.

Id. at 20.

2. See 20 U.S.C. §§ 41–70 (2006).

3. 20 U.S.C. § 41 (“The President, the Vice President, the Chief Justice, and the heads of executive departments are constituted an establishment by the name of the Smithsonian Institution *for the increase and diffusion of knowledge among men* . . .” (emphasis added)); see SMITHSONIAN INST., MANAGEMENT’S DISCUSSION AND ANALYSIS FY 2008 1, 5 (2008), available at http://www.si.edu/opanda/docs/Smithsonian%20Institution_MDA_FY2008.pdf [hereinafter MANAGEMENT’S DISCUSSION].

4. MANAGEMENT’S DISCUSSION, *supra* note 3, at 1 (“[The Smithsonian] has evolved to become the world’s largest museum and research complex With 19 museums, numerous research centers, and the National Zoo, the Smithsonian is a leader in science, history, art, and culture.”).

5. *Id.*

6. *Id.*

This uncertainty results from the Smithsonian's ambiguous place in the structure of American government. As a codified gift receiving both private and public funding,⁷ the Institution has been described as a "historical and legal anomaly,"⁸ "a very unusual entity,"⁹ "*sui generis*,"¹⁰ and "unique unto its own terms."¹¹ As such, it is facially unclear how the Smithsonian fits into the American tripartite schematic¹²—in particular, whether it is an executive agency for purposes of Title 5 of the United States Code.¹³

Title 5 defines an executive agency as "an Executive department, a Government corporation, and an *independent establishment*."¹⁴ In turn, an independent establishment is "an establishment in the executive branch . . . which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment."¹⁵ Despite these definitions, the Institution's unique governing structure, method of establishment, funding sources, and general functions make discerning its identity a difficult endeavor.¹⁶

Because the Smithsonian thrives well, this search for a clear denotation may seem a futile one. Courts, however, often have grappled with this issue in determining whether certain statutes apply to the Smithsonian and have reached inconsistent conclusions.¹⁷ In determining with which statutes the

7. SMITHSONIAN INST., FY 2007 SMITHSONIAN BUDGET SOURCES (2007), *available at* http://www.si.edu/about/documents/fy07_SI_budget_source.pdf [hereinafter FY 2007 BUDGET SOURCES] (reporting that the budget receives about sixty-two percent of its funding from federal appropriations and the remainder from trust funds).

8. 12 Op. Off. Legal Counsel 122, 123 (1988) (quoting Memorandum from Theodore B. Olson, Assistant Attorney Gen., to the Attorney Gen. I (May 23, 1983)).

9. *Id.* (quoting Memorandum from Theodore B. Olson, Assistant Attorney Gen., to the Attorney Gen. I).

10. *Id.* (quoting 3 Op. Off. Legal Counsel 274, 277 (1979)). "*Sui generis*" is defined as "[o]f its own kind or class; unique or peculiar." BLACK'S LAW DICTIONARY 1572 (9th ed. 2009).

11. 12 Op. Off. Legal Counsel at 123 (quoting Memorandum from Leon Ulman, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Peter Powers, Gen. Counsel, the Smithsonian Inst. 9 (Feb. 19, 1976)).

12. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

13. *See* 5 U.S.C. § 105 (2006) ("For the purpose of this title, 'Executive agency' means an Executive department, a Government corporation, and an independent establishment.").

14. *Id.* (emphasis added).

15. *Id.* § 104.

16. *See infra* note 62.

17. *Compare* *Dong v. Smithsonian Inst.*, 125 F.3d 877, 879 (D.C. Cir. 1997) (finding that the Smithsonian is not an establishment in the executive branch and, therefore, is not an agency subject to the Privacy Act), *with* *Pessa v. Smithsonian Inst.*, 60 M.S.P.R. 421, 425 (1994) (holding that the Smithsonian is an independent establishment and, therefore, is an executive agency for purposes of 5 U.S.C. § 105).

Smithsonian must comply, it is necessary to ascertain whether this entity of great historical and cultural significance is an executive agency as defined by Title 5. A close analysis of its characteristics, mode of establishment, and similarities to other independent establishments reveals that the Smithsonian should be considered an executive agency subject to applicable Code provisions.¹⁸ This identity, however, may prove detrimental to the Institution.

This Comment discusses the varying approaches that courts and relevant authorities have taken in analyzing the Smithsonian's status as an executive agency. It first explores the idea of an independent establishment. Then, it reviews relevant cases and authorities that have wrestled with this issue. Next, this Comment analyzes the determinations rejecting the theory that the Smithsonian is an executive agency before assessing authority supporting the opposite proposition. Addressing the various interpretations and employing the analytical techniques authorities have used, this Comment then explores the possibility that the Smithsonian is an executive agency, ultimately determining that it is. Finally, this Comment discusses the implications that this classification has for the Institution and concludes that, although the Smithsonian is an executive agency, Congress should consider redefining it and setting parameters for applicable statutes and directives in order to preserve the Institution's unique nature.

I. THE SMITHSONIAN'S ESTABLISHMENT AND THE CONCLUSIONS OF VARIOUS AUTHORITIES PROVIDE A SHAKY FRAMEWORK FOR THE DISCUSSION OF WHETHER THE SMITHSONIAN IS AN EXECUTIVE AGENCY

An overview of judicial decisions and the analyses of other relevant authorities regarding the Smithsonian's identity reveal that the debate is a live one, with no certain conclusion.¹⁹

A. The Birth of the Smithsonian Institution

The Smithsonian Institution, a trust instrumentality of the United States,²⁰ was founded in 1846 "for the increase and diffusion of knowledge among men."²¹ Its founding was premised on James Smithson's will,²² which devised to the United States all of Smithson's property and required that it be located in

18. See *infra* Part II.B.

19. See *infra* Part I.C–D.

20. MANAGEMENT'S DISCUSSION, *supra* note 3, at 6.

21. 20 U.S.C. § 41 (2006).

22. See *supra* note 1. Interestingly, Smithson's motive in devising his property to the United States is unknown. Langley, *supra* note 1, at 22. Smithson had no ties to anyone in the United States, nor did any of his effects reference the United States or its countrymen. *Id.* The language of his will, see *supra* note 1, however, parallels President Washington's farewell address: "Promote, as an object of primary importance, institutions for the general diffusion of knowledge." *Id.*

Washington, D.C., and be known as the *Smithsonian Institution*.²³ Congress accepted this gift²⁴ and codified the Smithsonian's existence, providing for its purpose, governance, and financing.²⁵ Since its inception, the Institution, with nineteen museums and numerous research centers, "has evolved to become the world's largest museum and research complex."²⁶

The Smithsonian takes as its charter 20 U.S.C. §§ 41–70, which incorporates the Institution and establishes a governing body, the Board of Regents (the Board).²⁷ This Board, composed of "the Vice President, the Chief Justice of the United States, three Members of the Senate, three Members of the House of Representatives, and nine other persons,"²⁸ regulates itself through a series of bylaws and internal leadership.²⁹ These regulations contain specific provisions addressing, inter alia, the meetings,³⁰ committees,³¹ and chairmanship of the Board.³² The fact that each branch of government is represented on the Board, along with appointed private citizens,³³ contributes to the initial uncertainty of the Institution's place in American government.

B. An Independent Establishment Is an Executive Agency for Purposes of Title 5

In order to determine where the Smithsonian falls within the three branches of government and, more pointedly, whether it is an executive agency, it is helpful to consider the statute defining executive agency. Title 5 provides a seemingly straightforward definition: "For the purpose of this title, 'Executive agency' means an Executive department, a Government corporation, and an independent establishment."³⁴ An independent establishment,³⁵ in turn, is

23. See Langley, *supra* note 1, at 20; see also SMITHSONIAN INST., A SMITHSONIAN FOR THE FUTURE: SMITHSONIAN INSTITUTION STRATEGIC PLAN FISCAL YEARS 2006 TO 2011 1 (2006), available at <http://www.si.edu/about/documents/sistrategicplan2006to2011.pdf> (acknowledging that Smithson gave his estate "to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an Establishment for the increase and diffusion of knowledge").

24. See Act of July 1, 1836, ch. 252, § 1, 5 Stat. 64, 64 (empowering the President to appoint an agent to ensure the proper establishment and finance of the Smithsonian).

25. See 20 U.S.C. §§ 41–70 (2006).

26. MANAGEMENT'S DISCUSSION, *supra* note 3, at 1.

27. See 20 U.S.C. §§ 41, 42.

28. 20 U.S.C. § 42.

29. See generally SMITHSONIAN INST., BYLAWS OF THE BOARD OF REGENTS AND CHARTER PROVISIONS OF THE SMITHSONIAN INSTITUTION (2009), available at <http://www.si.edu/about/regents/documents/BYLAWS%20AND%20CHARTER%2001-2009.pdf>.

30. *Id.* §§ 2.04–13.

31. *Id.* §§ 4.01–11.

32. *Id.* § 5.02.

33. See 20 U.S.C. § 42.

34. 5 U.S.C. § 105 (2006).

35. Because the courts grapple with this classification and it is the most plausible argument that the Institution is an executive agency, this Comment focuses on the identity of the

defined for purposes of Title 5 as “an establishment in the executive branch . . . which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment.”³⁶ Accordingly, in order for the Smithsonian to be considered an independent establishment, and therefore an executive agency, it must be (1) an establishment and (2) housed within the executive branch.³⁷

The first part of this analysis is easily satisfied. An establishment, according to *Black’s Law Dictionary*, is “the state or condition of being established . . . ; [a]n *institution* or place of business.”³⁸ The Smithsonian, being an institution by its very name, fits the latter half of this definition.³⁹ Additionally, its founding document demonstrates that Congress intended the Smithsonian to be an establishment by providing that “[t]he President, the Vice President, the Chief Justice, and the heads of executive departments are constituted an *establishment* by the name of the Smithsonian Institution.”⁴⁰

The second part of the analysis, whether the Smithsonian is “an establishment *in the executive branch*,”⁴¹ has been the source of much debate.

Smithsonian as an independent establishment and, thereby, an executive agency. *See id.* (identifying independent establishments as executive agencies). Assessing the Smithsonian as an “Executive department” or “a Government corporation” is outside the scope of this Comment.

36. *Id.* § 104(1). It cannot be ignored that, for the Smithsonian to be an independent establishment, according to the statute, it cannot be an Executive department, military department, government corporation, or part thereof, or part of an independent establishment. *Id.* To determine if the Smithsonian fits into one of these designations, it is helpful to look to statutes defining the respective entities. 501 U.S.C. § 101 lists the Executive departments as including all the cabinet-level departments, such as the Department of State and the Department of Justice. *Id.* § 101. The list does not include the Smithsonian Institution, nor is the Smithsonian a department of this nature. Likewise, the Smithsonian is not among the military departments, which consist of the Department of the Army, the Department of the Navy, and the Department of the Air Force. *Id.* § 102. “Government corporation” is defined as a “corporation owned or controlled by the Government of the United States.” *Id.* § 103. Although the Smithsonian may arguably be classified as a government corporation, case law does not directly address this, and the discussion of this issue is outside the scope of this Comment. *See Dong v. Smithsonian Inst.*, 125 F.3d 877, 879 (D.C. Cir. 1997) (reasoning that the Smithsonian is not a government-controlled corporation because it is not an establishment in the executive branch, a term which necessarily encompasses government-controlled corporations under the Privacy Act); *Dodge v. Trs. of the Nat’l Gallery of Art*, 326 F. Supp. 2d 1, 11 (D.D.C. 2004) (citing *Dong*, 125 F.3d at 879) (reasoning that the Smithsonian is not subject to the Privacy Act because it is not an “agency” under the Act’s definition). Lastly, the Smithsonian is not “part” of another larger entity. *See Dong*, 125 F.3d at 879, 883 (excluding the Smithsonian from the entities qualifying as agencies). Because it does not qualify as an Executive department, a Government corporation, or part of another independent establishment, this Comment analyzes the Smithsonian as an independent establishment.

37. *See* 5 U.S.C. § 104(1).

38. BLACK’S LAW DICTIONARY 626 (9th ed. 2009) (emphasis added).

39. *See* 20 U.S.C. § 41 (2006) (“The President, the Vice President, the Chief Justice, and the heads of executive departments are constituted an establishment *by the name of the Smithsonian Institution* for the increase and diffusion of knowledge among men.” (emphasis added)).

40. *Id.* (emphasis added).

41. 5 U.S.C. § 104 (emphasis added).

In attempting to settle this issue, courts have varied in both methodology and outcome.⁴²

Identity as an independent establishment is not an issue specific to the Smithsonian, however. Courts have grappled with the concept of independent establishments and have attempted to define the precise characteristics of such entities with regard to many other institutions and organizations.⁴³ In doing so, courts often look to the denotative provisions of Title 5, namely 5 U.S.C. §§ 104 and 105.⁴⁴

For example, the Second Circuit rejected the idea that the Office of Inspector General of the Department of Justice (OIG) was an independent establishment and, therefore, an executive agency under the Federal Labor Management Relations Act (FLMRA).⁴⁵ After acknowledging the division among the circuits,⁴⁶ the court concluded that components of larger agencies or departments are not independent establishments and are, therefore, not

42. Compare *Dong v. Smithsonian Inst.*, 125 F.3d 877, 879 (D.C. Cir. 1997) (finding that the Smithsonian is not an agency for purposes of the Privacy Act), with *Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst.*, 566 F.2d 289, 296 (D.C. Cir. 1977) (determining that the Smithsonian is an independent establishment in the executive branch for purposes of the Federal Torts Claims Act).

43. See, e.g., *Fed. Labor Relations Auth. v. U.S. Dep't of Justice*, 137 F.3d 683, 688–89 (2d Cir. 1997) (finding that parts of Executive departments are not independent establishments), *vacated*, 527 U.S. 1031 (1999); *Haddon v. Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995) (per curiam) (distinguishing the Executive Residence from independent establishments).

44. See, e.g., *Fed. Labor Relations Auth.*, 137 F.3d at 688–89 (examining the definition of executive agency in 5 U.S.C. § 105, thus prompting an examination of the definition of independent establishment in § 104).

45. *Id.* at 689, *vacated*, 527 U.S. 1031, 1031 (1999) (remanding in light of its decision in *Nat'l Aeronautics & Space Admin. v. Fed. Labor Relations Auth.*, 527 U.S. 229 (1999)). Although the Second Circuit's decision was vacated, the Court in *National Aeronautics & Space Administration v. Federal Labor Relations Authority* did not address the issue of whether the OIG was an independent establishment subject to the FLMRA and therefore did not change the analysis offered by the Second Circuit. See *Nat'l Aeronautics & Space Admin.*, 527 U.S. at 231. The FLMRA defines "agency" as "an Executive agency . . . , the Library of Congress, the Government Printing Office and the Smithsonian Institution." 5 U.S.C. § 7103(3). The Second Circuit considered the definition of executive agency in 5 U.S.C. § 105, which prompted its discussion of independent establishments. See *Fed. Labor Relations Auth.*, 137 F.3d at 688–89. Additionally, that the Smithsonian Institution is considered an executive agency under the FLMRA is a direct result of the Workforce Investment Act. Workforce Investment Act of 1988, Pub. L. No. 105-220, § 341(e), 112 Stat. 936, 1092 (codified as amended at 5 U.S.C. § 7103(a)(3)).

46. See *Fed. Labor Relations Auth.*, 137 F.3d at 689 ("Whether this definition of 'independent establishment' includes the OIG of a cabinet department is a matter on which three Circuits have divided.").

executive agencies⁴⁷ subject to the FLMRA.⁴⁸ The court based its holding on the definition of independent establishment, which explicitly excludes any “[e]xecutive departments or parts thereof.”⁴⁹ Given that the Smithsonian’s governing statute does not establish it as a part of, beneath, or an extension of another entity, a similar analysis would not exclude the Smithsonian from the independent-establishment category.⁵⁰

The District of Columbia Circuit, in *Haddon v. Walters*, took a similar approach in deciding whether the Executive Residence⁵¹ is an independent establishment and, thereby, an executive agency.⁵² It admitted that the “definition of independent establishment does not clearly foreclose” the argument that the Executive Residence is an independent establishment.⁵³ It noted, however, that, in other provisions, Congress used the term “Executive Residence” separately from independent establishment, suggesting that Congress considered the entities distinct.⁵⁴ Accordingly, the court held that the Residence is not an independent establishment.⁵⁵

Given the broad definition of independent establishment, courts have been forced to look outside the plain language of 5 U.S.C. § 104 to determine whether an entity is an independent establishment.⁵⁶ The same technique also must apply to the question of the Smithsonian’s identity.

47. *Id.* The Second Circuit also considered an Eleventh Circuit decision that, too, found that the larger department is the “agency,” but smaller components of the department are not. *Id.* (citing *Fed. Labor Relations Auth. v. Nat’l Aeronautics & Space Admin.*, 120 F.3d 1208, 1213 (11th Cir. 1997)).

48. 5 U.S.C. § 7101–7106.

49. *Fed. Labor Relations Auth.*, 137 F.3d at 688–89; see 5 U.S.C. § 104.

50. See 20 U.S.C. § 41 (2006); see also MANAGEMENT’S DISCUSSION, *supra* note 3, at 5–6 (describing the Smithsonian as a unique entity that is not part of the executive branch).

51. “[T]he Executive Residence is exclusively dedicated to assisting the President in maintaining his home and carrying out his various ceremonial duties.” Marjorie A. Shields, Annotation, *What Constitutes “Agency” for Purposes of Freedom of Information Act*, 165 A.L.R. FED. 591 § 4(b) (2000). Interestingly, although serving as the home of the first family, the Executive Residence has been described as a museum, a wedding chapel, a hotel, an art gallery, a conference center, and a library. BRADLEY H. PATTERSON, *TO SERVE THE PRESIDENT: CONTINUITY AND INNOVATION IN THE WHITE HOUSE STAFF* 343 (2008).

52. See *Haddon v. Walters*, 43 F.3d 1488, 1489–90 (D.C. Cir. 1995).

53. *Id.* at 1490.

54. *Id.* (explaining that Congress used independent establishment separately from “Executive Residence” in 3 U.S.C. § 112 and that this distinction “suggests that Congress does not regard the Executive Residence to be an independent establishment”). Additionally, the opinion distinguishes the definition of executive agency found in Title 5 from the definition found in Title 3, which “addresses similar concerns [as Title 5] with respect to the President’s advisors and the staff of the Executive Residence.” *Id.*; see also 3 U.S.C. § 112 (2006).

55. *Haddon*, 43 F.3d at 1490. The rationale employed by the *Haddon* court, which distinguished the Executive Residence from independent establishments based on statutory construction, similarly applies to the Smithsonian. See *infra* Part II.A. For purposes of the Smithsonian, however, this reasoning is not determinative. See *infra* Part II.A.

56. See, e.g., *Haddon*, 43 F.3d at 1490.

C. Some Authorities, Including the Smithsonian Itself, Have Concluded that the Institution Is Not an Independent Establishment

Before discussing judicial analyses, the Smithsonian's self-identity should be considered. The Smithsonian claims that it exists outside the executive branch, and therefore rejects an identity as an independent establishment.⁵⁷ It asserts that, "[a]s a trust instrumentality of the United States, many of the laws and directives applicable to federal agencies do not apply to the Institution."⁵⁸ The Institution further "perceives itself as 'not a government agency in any ordinary use of the term, but [as] a charitable trust for the benefit of humankind whose trustee is the United States.'"⁵⁹

The Office of the Federal Register's United States Government Manual takes a similar position in categorizing the Smithsonian as a "Quasi-Official Agenc[y]."⁶⁰ By including the Smithsonian in this category, the authors designate it as one of four entities⁶¹ that are not executive agencies, but that are nonetheless subject to certain federal requirements.⁶²

57. See MANAGEMENT'S DISCUSSION, *supra* note 3, at 5 ("[T]he Smithsonian is not part of the Executive Branch.").

58. *Id.* Contrarily, the Office of Legal Counsel observed that "[t]he Smithsonian considers itself to be a 'Federal agency' but not an executive agency." 12 Op. Off. Legal Counsel 122, 125 (1988). This directly contradicts the assertion that the Institution is not subject to the same laws as federal agencies, which are not necessarily executive agencies. Moreover, the Smithsonian has argued that it is "within the term 'the United States' as used in [28 U.S.C.] § 1498(b)," *O'Rourke v. Smithsonian Inst. Press*, 399 F.3d 113, 114 (2d Cir. 2005), which provides a cause of action against the United States for copyright infringement. 28 U.S.C. § 1498(b) (2006). The Smithsonian's self-identification, coupled with the Office of Legal Counsel's statement, implies that the Smithsonian considers itself, at minimum, a part of the federal government. See *O'Rourke*, 399 F.3d at 114; 12 Op. Off. Legal Counsel at 124–25.

59. 12 Op. Off. Legal Counsel at 123 (quoting Letter from Peter G. Powers, Gen. Counsel, Smithsonian Inst., to Douglas W. Kmiec, Deputy Assistant Attorney Gen., Office of Legal Counsel (Apr. 10, 1987)). Additionally, Chief Justice Taft, when serving as Chancellor of the Board of Regents, supported the Smithsonian's own definition, asserting that "[the Smithsonian] is a private institution under the guardianship of the Government," thereby distinguishing it from any particular branch of government. *Id.*

60. OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOV'T MANUAL 2008/2009 559 (2008).

61. *Id.* at 559, 575–76 (listing the Legal Services Corporation, the State Justice Institute, and the United States Institute of Peace as the other entities within this category).

62. *Id.* at 559 (explaining that the entities known as quasi-official agencies are "not executive agencies under the definition in 5 U.S.C. [§] 105 but . . . are required by statute to publish certain information on their programs and activities in the *Federal Register*"). Moreover, John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, argued that "[t]he history of the Smithsonian suggests that Congress created the entity outside the Executive Branch," the most significant events being Smithson's bequest and the Institution's subsequent codification. Memorandum Opinion from John P. Elwood, Deputy Assistant Attorney Gen., Office of Legal Counsel on the Office of Gov't Ethics Jurisdiction over the Smithsonian Inst., to the Dir. of the Office of Gov't Ethics 5 (Feb. 29, 2008). Elwood argued that this legislative action and the Institution's governing structure, to which the President appoints none of the

In addition to this self-denotation and government classification, the District of Columbia Circuit attempted to address the Smithsonian's identity within the context of the Privacy Act.⁶³ In *Dong v. Smithsonian Institution*, an employee brought suit under the Privacy Act against the Smithsonian for failing to contact her when investigating her alleged misconduct.⁶⁴ The employee complained that the Smithsonian's conduct violated the Privacy Act because the Act "requires federal agencies, when gathering information that may lead to an adverse determination about an individual, to obtain that information directly from the individual."⁶⁵

The Smithsonian's primary defense to the allegation was that it was not an "agency" to which the Privacy Act applied.⁶⁶ In analyzing this argument, the District of Columbia Circuit agreed with the Smithsonian, specifically noting that "[i]t is plain that the Smithsonian is not an establishment in the executive branch,"⁶⁷ and, therefore, is not an entity covered by the Act's definition of "agency."⁶⁸

In so concluding,⁶⁹ the court reasoned that the Smithsonian must be considered an "establishment in the executive branch" or a "Government controlled corporation" to qualify as an independent establishment.⁷⁰ In assessing the former, the court analyzed the governance of the Institution, noting that "nine of the seventeen members of [the] governing Board of

seventeen Board members, is strong evidence that the Smithsonian exists outside of the executive branch. *Id.*

63. See *Dong v. Smithsonian Inst.*, 125 F.3d 877, 878–79 (D.C. Cir. 1997); see also 5 U.S.C. § 552(f)(1) (2006).

64. See *Dong*, 125 F.3d at 877–78. In *Dong*, an employee of the Joseph H. Hirshhorn Museum and Sculpture Garden, an entity of the Smithsonian, defied museum policy and accompanied a painting to the Museum of Modern Art in New York without the requisite approval. *Id.* at 877; see also 20 U.S.C. § 76bb(a) (2006) (establishing the Joseph H. Hirshhorn Museum and Sculpture Garden as part of the Smithsonian). The Smithsonian initiated its investigation by contacting the New York museum directly, neglecting to question the employee first. *Dong*, 125 F.3d at 878. The museum confirmed the employee's trip and the receipt of the painting, and the Smithsonian suspended the employee for five days. *Id.* Because of the suspension, the plaintiff sued the Smithsonian under the Privacy Act. *Id.*

65. *Dong*, 125 F.3d at 878 (quoting 5 U.S.C. § 552a(e)(2)).

66. *Id.* The Privacy Act defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government." 5 U.S.C. § 552(f).

67. *Dong*, 125 F.3d at 879.

68. *Id.*; see also 5 U.S.C. § 552(f). The court also rejected the argument that the Smithsonian may be housed within one of the other categories included in the definition of agency. *Dong*, 125 F.3d at 879 ("Of the categories listed in § 552(f), the only ones that might be thought to cover the Smithsonian are 'establishment in the executive branch' and 'Government controlled corporation.'"). The court then rejected the Smithsonian's identity as a government-controlled corporation. *Id.*; see *supra* note 36.

69. *Dong*, 125 F.3d at 879 (finding that the Smithsonian is not an agency as defined by the Privacy Act); see *supra* note 66.

70. *Dong*, 125 F.3d at 879–80.

Regents are appointed by joint resolution of Congress,” and that the Secretary of the Smithsonian does not answer to the President.⁷¹ The court further observed that if the Smithsonian possessed executive authority, it would violate the constitutional principle of separation of powers.⁷² In finding that the Smithsonian was not part of the executive branch, the court concluded that it was not an agency subject to the Privacy Act.⁷³ Accordingly, the Smithsonian’s investigatory action was within the bounds of the Privacy Act.⁷⁴

In 2004, the United States District Court for the District of Columbia similarly decided in *Dodge v. Trustees of the National Gallery of Art*.⁷⁵ Like *Dong*, the *Dodge* court addressed a Privacy Act suit against an entity of the Smithsonian, the National Gallery of Art.⁷⁶ The plaintiff-employee received one year of approved leave due to his son’s medical condition⁷⁷ and, four months into his leave, refused to work mandated overtime.⁷⁸ The Smithsonian requested the plaintiff’s leave information to assess whether he was excused from his overtime obligation.⁷⁹ After review, the Smithsonian concluded that he was not excused and pursued disciplinary action.⁸⁰ The plaintiff maintained that the Institution’s review of those records breached the confidentiality of his son’s medical documents and, therefore, violated the Privacy Act.⁸¹

71. *Id.* at 879.

72. *Id.* Professor Linda Jellum defines “separation of powers” as “the allocation of power and function among the branches of the government.” Linda D. Jellum, “Which is to be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 854 (2009). Separation of powers concerns the distinct role and authority that each of the three branches executes “in creating, interpreting, and implementing law.” *Id.* The judicial branch wields power to hear, decide, and interpret cases and controversies, U.S. CONST. art. III, § 2, the executive branch holds the power to execute laws, U.S. CONST. art. II, § 1, 2, and the legislative branch promulgates these laws, U.S. CONST. art. I, § 8. The *Dong* court was concerned that having members of the judicial and legislative branches serving on the governing board of an establishment in the executive branch would violate the separation of powers doctrine. *Dong*, 125 F.3d at 879.

73. *Dong*, 125 F.3d at 883.

74. *Id.*

75. See *Dodge v. Trs. of the Nat’l Gallery of Art*, 326 F. Supp. 2d 1, 11 (D.D.C. 2004) (“The Smithsonian Museums . . . are not subjected to the limitations of the Privacy Act because they do not fall within the definition of an ‘agency.’”).

76. *Id.* at 4 n.1; see 20 U.S.C. § 71 (2006) (appropriating a specified area in Washington, D.C. “to the Smithsonian Institution as a site for a National Gallery of Art” and further authorizing the Smithsonian to construct on that area “a building to be designated the National Gallery of Art”).

77. *Dodge*, 326 F. Supp. 2d at 4–5.

78. *Id.* at 5.

79. *Id.*

80. *Id.* at 5–6.

81. *Id.* at 4. The Privacy Act asserts that “[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the

Subsequently, the plaintiff wrote letters to two U.S. senators complaining of the Smithsonian's action, an action that resulted in two senatorial inquiries.⁸² Allegedly, the Smithsonian responded to this by posting a "Security Alert" around the National Gallery listing the "plaintiff's photograph, age, height, weight, date of birth, sex, race, complexion and Social Security number."⁸³ The plaintiff argued that this conduct was a retaliatory action that, too, violated the Privacy Act.⁸⁴

In analyzing the viability of the suit,⁸⁵ the court considered the Smithsonian's sovereign immunity, eventually finding that "the National Gallery is a Smithsonian Museum and is therefore a government entity"⁸⁶ immune from suit.⁸⁷ It then explained that "[e]ven if the National Gallery were not immune from suit, it is still not subject to the Privacy Act" because, given case law and the Institution's structure, the Smithsonian is not an "agency" for purposes of the Act.⁸⁸ The court excluded the Smithsonian from those categories of entities considered "agenc[ies]" under the Act, including "other

individual to whom the record pertains." 5 U.S.C. § 552a(b) (2006). The plaintiff claimed that supplying confidential medical records violated this provision. *Dodge*, 326 F. Supp. 2d at 4.

82. *Dodge*, 326 F. Supp. 2d at 6. He also sent letters to seven United States congressmen. *Id.*

83. *Id.*

84. *Id.* at 4, 6.

85. The plaintiff and the National Gallery of Art settled the dispute while the suit was pending on appeal before the Merit Systems Protection Board. *Id.* at 8. The terms of the settlement provided for the plaintiff's reinstatement to his position for four months, after which he would submit a letter of resignation. *Id.* Under the agreement, the plaintiff also waived his right to judicial relief, stating, in part, "This Agreement resolves all matters arising from Appellant's removal from the Gallery; including his Merit Systems Protection Board . . . appeal . . . and *any and all claims of any nature* which Appellant raised or could raise in any forum." *Id.* The plaintiff cooperated with the terms of the agreement by filing his resignation. *Id.* He then, however, initiated an action against five individual defendants, not including the National Gallery of Art. *Id.* The *Dodge* decision addresses the latter suit against these individuals. *Id.* at 4 n.1.

86. *Id.* at 11. In finding that the National Gallery of Art was a Smithsonian Museum and thus a government entity, the *Dodge* court considered its means of establishment, noting that "Congress established the National Gallery under the auspices of the Smithsonian Institution." *Id.* at 10 (citing 20 U.S.C. § 72 (2006)). Once the court established that the National Gallery was a Smithsonian Museum, it cited authority that defined the Smithsonian as a government entity, observing that the "D.C. Circuit has specifically found that the Smithsonian Museums qualify as government entities." *Id.* at 11 (citing *Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst.*, 566 F.2d 289, 296 (D.C. Cir. 1977)). Therefore, the court transitively reasoned that the National Gallery of Art was immune from suit because it qualified as a Smithsonian Museum, which enjoyed sovereign immunity as a government entity. *Id.* at 10-11.

87. *Id.* at 11 ("The National Gallery is not subject to suits to which it has not explicitly consented. Since the government has not waived sovereign immunity with regard to the Privacy Act as it applies to the National Gallery, the plaintiff's claim against the National Gallery cannot stand.").

88. *Id.* at 11-12 (citing *Dong v. Smithsonian Inst.*, 125 F.3d 877, 878-79 (D.C. Cir. 1997)).

establishment[s] in the executive branch of the Government.”⁸⁹ As such, the court implicitly found that the Smithsonian was not an establishment in the executive branch.⁹⁰

D. Other Authorities Have Found that the Smithsonian Is an Executive Agency

In 1977, the District of Columbia Circuit was confronted with the same issue under a different statute and focused on the Smithsonian’s immunity from suit for purposes of the Federal Tort Claims Act (FTCA).⁹¹ In *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*, the court addressed a libel action against the Smithsonian, ultimately finding that the Smithsonian enjoyed government immunity in libel suits under the FTCA.⁹²

In extending immunity to the Smithsonian, the court addressed the threshold question of whether the Smithsonian was a federal agency for purposes of the FTCA.⁹³ Under the FTCA, a federal agency is an “independent establishment[] of the United States.”⁹⁴ In concluding that the Smithsonian was a federal agency within this definition, the court noted that, despite the Institution’s “private dimension, . . . the nature of its function as a national museum and center of scholarship, coupled with the substantial governmental

89. 5 U.S.C. § 552a(a)(1) (2006) (adopting the definition of “agency” set forth in 5 U.S.C. § 552(f)). The other entities that are agencies under the Privacy Act are “executive department[s], military department[s], Government corporation[s], Government controlled corporation[s] . . . [and] any independent regulatory agenc[ies].” *Id.* (adopting the definition of agency from § 552(f)).

90. *See Dodge*, 326 F. Supp. 2d at 11–12.

91. *See Expeditions Unlimited Aquatic Enters., Inc.*, 566 F.2d at 296. A relevant provision of the FTCA explains that the district courts have jurisdiction over “civil actions on claims against the United States, for money damages . . . for . . . [a] wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant.” 28 U.S.C. § 1346(b)(1) (2006). The FTCA specifies that actions against the federal government are subject to provisions in Chapter 171, which contain notable definitions and exceptions. *Id.*; *see also* 28 U.S.C. § 2680 (outlining the claims to which the FTCA does not apply).

92. *Expeditions Unlimited Aquatic Enters., Inc.*, 566 F.2d at 291 (granting “summary judgment for defendant Smithsonian Institution on governmental immunity grounds”). A suit also was brought against the Chairman of the Department of Anthropology at the Smithsonian’s Museum of Natural History. *Id.* In granting summary judgment for the Smithsonian on sovereign immunity grounds, the District of Columbia Circuit thoroughly interpreted the FTCA and concluded that it permitted immunity in libel suits. *Id.* at 299. It held that the exception clause contained in the FTCA should “be read as defining the existence of immunity in suits involving deliberate torts.” *Id.* The exception clause specifically provides that Chapter 171 and 28 U.S.C. § 1346(b) do not apply to libel claims. 28 U.S.C. § 2680(h).

93. *Expeditions Unlimited Aquatic Enters., Inc.*, 566 F.2d at 296 (explaining that the first step in the court’s analysis is to decide whether the Smithsonian is a federal agency for purposes of the FTCA).

94. 28 U.S.C. § 2671. The Act’s definition of “agency” also “includes the executive departments, the judicial and legislative branches, the military departments, . . . and corporations primarily acting as instrumentalities or agencies of the United States.” *Id.*

role in funding and oversight, make the institution an ‘independent establishment of the United States,’ within the ‘federal agency’ definition.”⁹⁵

Similarly, the Department of Justice, Office of Legal Counsel (OLC), responding to a question concerning the status of the Smithsonian under the Federal Property and Administrative Services Act (Property Act),⁹⁶ determined that the Smithsonian was an executive agency⁹⁷ subject to the Act.⁹⁸ In reaching this conclusion, OLC first noted the absence of explicit applicability and pertinent legislative history.⁹⁹ Because the Smithsonian’s power to conduct property transactions was repealed and delegated to executive agencies generally, OLC reasoned that Congress likely considered the Smithsonian an executive agency subject to the Property Act.¹⁰⁰

In 1992, the United States District Court for the District of Columbia, in *Cotton v. Adams*, found the Smithsonian subject to yet another statute, the Freedom of Information Act (FOIA),¹⁰¹ from which the Privacy Act takes its definition of “agency.”¹⁰² In *Cotton*, the plaintiff filed a FOIA request seeking reports from the Smithsonian’s Office of Inspector General that pertained to two employees of the Smithsonian’s Museum Shops.¹⁰³ In response, the Smithsonian released two of the four documents sought, claiming that the withheld documents were exempt from disclosure.¹⁰⁴ Before discussing the alleged exemption, the *Cotton* court denied the Smithsonian’s contention that it was not subject to FOIA,¹⁰⁵ and found instead that, given FOIA’s definition of

95. *Expeditions Unlimited Aquatic Enters. Inc.*, 566 F.2d at 296.

96. The purpose of the Property Act is to “facilitate the procurement of property and services.” 41 U.S.C. § 251 (2006). The Act, among other things, lists provisions with which executive agencies must comply when purchasing or contracting for property. *Id.* § 252.

97. 40 U.S.C. § 102 (2006) (defining executive agency for purposes of the Property Act as an “independent establishment in the executive branch of the Government”).

98. 12 Op. Off. Legal Counsel 122, 127 (1988).

99. *Id.* at 125 (“Congress did not expressly specify the status of the Smithsonian under the Property Act. Nor does the legislative history of the Property Act elaborate on the definitions of ‘executive agency’ and ‘Federal agency’ contained in the Act.”); see H.R. REP. NO. 670, at 8 (1949), reprinted in 1949 U.S.C.C.A.N. 1475, 1481–82 (failing to define executive agency and federal agency).

100. 12 Op. Off. Legal Counsel at 126–27.

101. *Cotton v. Adams*, 798 F. Supp. 22, 24 (D.D.C. 1992); see also 5 U.S.C. § 552 (2006).

102. See *infra* notes 146–49 and accompanying text.

103. *Cotton*, 798 F. Supp. at 23.

104. *Id.* at 24. The *Cotton* court explained that the Smithsonian withheld the documents pursuant to two exemptions provided in FOIA. *Id.* The specific exemptions protected documents containing “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,” 5 U.S.C. § 552(b)(6), and those the disclosure of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy,” *id.* § 552(b)(7)(C).

105. *Cotton*, 798 F. Supp. at 24.

“agency,”¹⁰⁶ the “Smithsonian’s structure reveal[ed] its status as an authority of the government properly subject to the FOIA.”¹⁰⁷

Additionally, the Merit Systems Protection Board (MSPB),¹⁰⁸ in *Pessa v. Smithsonian Institution*, addressed a whistle-blower retaliation action and determined that the Smithsonian was an independent establishment for purposes of 5 U.S.C. § 2302, which details prohibited personnel practices.¹⁰⁹ The case focused on the MSPB’s jurisdiction over an appeal in which the appellant argued that the Smithsonian had rendered an unfair performance rating in retaliation of her protected whistle-blowing.¹¹⁰ After finding that issuing a performance rating constituted a “personnel action,”¹¹¹ the court turned to the secondary issue of whether the employee worked for an agency subject to 5 U.S.C. § 2302(a)(2)(c).¹¹² The statute defines agency as “an Executive agency and the Government Printing Office.”¹¹³ As an independent establishment,¹¹⁴ the Board reasoned that the Smithsonian was an executive agency for purposes of 5 U.S.C. § 105, and therefore an executive agency under § 2302(a)(2)(C).¹¹⁵ Accordingly, the court held that the statute applied to the Smithsonian and that the suit was proper.¹¹⁶

106. FOIA defines “agency” to “include[] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” 5 U.S.C. § 552(f).

107. *Cotton*, 798 F. Supp. at 24.

108. *See infra* note 170.

109. *Pessa v. Smithsonian Inst.*, 60 M.S.P.R. 421, 425 (1994); *see also* 5 U.S.C. § 2302.

110. *Pessa*, 60 M.S.P.R. at 423.

111. *Id.* at 425. The statute defines “personnel action” as including, among other things, “(i) an appointment; (ii) a promotion; . . . (iv) a detail, transfer or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; [and] (viii) a performance evaluation under chapter 43 of this title.” 5 U.S.C. § 2302(a)(2)(A). Chapter 43 discusses the details of performance appraisal systems, providing that “[e]ach agency shall develop one or more performance appraisal systems which . . . provide for periodic appraisals of job performance of employees.” 5 U.S.C. § 4302(a)(1).

112. *Pessa*, 60 M.S.P.R. at 425.

113. 5 U.S.C. § 2302(a)(2)(C).

114. *Pessa*, 60 M.S.P.R. at 425 (“The Smithsonian Institution is an ‘independent establishment.’” (internal citation omitted)). In finding that the Smithsonian was an independent establishment, the *Pessa* court cited the Smithsonian’s charter at 20 U.S.C. § 41, which states that the Smithsonian is an “establishment,” and a 1907 Attorney General Opinion that asserts that the Smithsonian is “independent of any of the Executive Departments.” *Id.* (citing 20 U.S.C. § 41 (2006); 26 Op. Att’y Gen. 209, 214 (1907)).

115. *Pessa*, 60 M.S.P.R. at 425; *see* 5 U.S.C. §§ 105, 2302(a)(2)(C).

116. *Pessa*, 60 M.S.P.R. at 425.

E. The Workforce Investment Act and that the Smithsonian Employs Persons Holding Positions in the Competitive Service May Carry Implications for the Smithsonian's Identity

In addition to case law, the Workforce Investment Act and that the Smithsonian employs persons holding positions in the competitive service speak to its identity for purposes of Title 5.

In 1998, Congress passed the Workforce Investment Act,¹¹⁷ which stripped the Smithsonian of the sovereign immunity that it enjoyed under certain statutes.¹¹⁸ In so doing, Congress added the Smithsonian to lists of entities to which each statute applied, distinguishing it from executive agencies.¹¹⁹

Furthermore, the Institution employs persons holding positions in the competitive service.¹²⁰ By definition, the competitive service includes "all civil service positions in the *executive branch*."¹²¹ The only exception to this is statutory specification that certain employees outside of the executive branch are part of the competitive service.¹²² Because no such statute exists with regard to the Smithsonian, Smithsonian employees within the competitive service, by definition, hold positions in the executive branch.¹²³ It is certainly significant that Smithsonian employees, by virtue of their employment with the Smithsonian, are considered part of the executive branch.

117. Workforce Investment Act of 1998, Pub. L. No. 105-220, § 341, 112 Stat. 936, 1092 (codified as amended in scattered sections of 5 U.S.C., 29 U.S.C., and 42 U.S.C.).

118. *See id.* (waiving the Smithsonian's sovereign immunity under the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and the labor management laws codified at 5 U.S.C. § 7103(a)(3)).

119. *See id.* For example, the Act states that "[s]ection 15(a) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(a)) is amended by inserting 'in the Smithsonian Institution,' before 'and in the Government Printing Office.'" *Id.* As a result, that statute now reads:

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the *Smithsonian Institution*, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

29 U.S.C. § 633a(a) (2006) (emphasis added).

120. *See* Telephone Interview with Tom Lawrence, Human Res., Smithsonian Inst. (Jan. 19, 2010) (explaining that approximately two-thirds of the Smithsonian's six thousand employees hold position within the competitive service).

121. 5 U.S.C. § 2102(a)(1) (2006) (emphasis added).

122. *Id.* § 2102(b).

123. *See id.* § 2102(a)(1). This may be significant because an independent establishment is "an establishment in the *executive branch*." *Id.* § 104 (emphasis added).

II. THE SMITHSONIAN IS AN EXECUTIVE AGENCY UNDER 5 U.S.C. § 105

Although some authority suggests the Smithsonian is not an executive agency,¹²⁴ a close examination of the Institution, along with other persuasive evidence, demonstrates that the Smithsonian is, indeed, an independent establishment and, therefore, an executive agency under 5 U.S.C. § 105.¹²⁵

*A. The Workforce Investment Act of 1998 Does Not Indicate that the Smithsonian Is Not an Executive Agency*¹²⁶

Statutory interpretation paralleling the *Haddon* court's rationale may uncover the effect that the Workforce Investment Act of 1998 has on the Smithsonian's identity.¹²⁷ With this Act, Congress distinguished the Institution from "executive agencies."¹²⁸ The *Haddon* court stated that because Congress "used the term 'independent establishment' in distinction to the Executive Residence," it did not consider the Residence an independent establishment.¹²⁹ Likewise, Congress's affirmative act of passing the Workforce Investment Act and subjecting the Smithsonian to specific statutes, but distinguishing it from executive agencies,¹³⁰ may suggest that Congress did not consider the Smithsonian an executive agency.

Judicial interpretation, however, and not congressional initiative, prompted at least portions of the amendment to the Workforce Investment Act.¹³¹ For example, the fact that courts' interpretations had not previously found the

124. See *supra* Part I.B–C (examining authority that concluded that the Smithsonian is not an independent establishment and thus not an executive agency).

125. See *infra* Part II.

126. Many thanks to Kristin Ellis, Esq., for suggesting this argument. Her thoughts and analysis about the Workforce Investment Act and its impact, as well as her additional research on the Smithsonian, contributed significantly to this Comment.

127. See *Haddon v. Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995); see also *supra* notes 117–18 and accompanying text.

128. See Workforce Investment Act of 1998, Pub. L. No. 105-220, § 341, 112 Stat. 936, 1092 (codified as amended in scattered sections of 5 U.S.C., 29 U.S.C., and 42 U.S.C.).

129. *Haddon*, 43 F.3d at 1490 ("That Congress distinguished the Executive Residence from the independent establishments . . . suggests that Congress does not regard the Executive Residence to be an independent establishment . . .").

130. Workforce Investment Act of 1998 § 341, 112 Stat. at 1092; see, e.g., 5 U.S.C. § 7103(a)(3) (2006) ("'[A]gency' means an Executive agency, . . . the Library of Congress, the Government Printing Office, and the Smithsonian Institution."); 42 U.S.C. § 2000e-16(a) (2006) (applying the Civil Rights Act of 1964 to the Smithsonian as well as to executive agencies defined under 5 U.S.C. § 105).

131. See *O'Rourke v. Smithsonian Inst. Press*, 399 F.3d 113, 121 (2d Cir. 2005) (explaining that strict construal of sovereign immunity waivers necessitated the Workforce Investment Act).

Smithsonian covered by 42 U.S.C. § 2000e-16(a)¹³² or 29 U.S.C. § 633a(a)¹³³ reflects judicial consideration of a longstanding concept of sovereign immunity, that “waivers of sovereign immunity are to be construed strictly and narrowly in favor of the sovereign.”¹³⁴ In accord with this principle, the Supreme Court has held that “[a] waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text.”¹³⁵

In the absence of congressional waiver, the Smithsonian enjoys sovereign immunity.¹³⁶ With the Workforce Investment Act, however, Congress explicitly and textually¹³⁷ waived the Smithsonian’s sovereign immunity under certain statutes.¹³⁸ Unlike *Haddon*, that Congress distinguished the Smithsonian from executive agencies does not mean that it rejected the Smithsonian’s identity as an executive agency for purposes of Title 5.¹³⁹ Rather, this distinction only indicates that Congress was reacting negatively to judicial interpretations of sovereign immunity and desired that the Smithsonian be amenable to suit and subject to the payment of damages for violating certain statutes.¹⁴⁰ Thus, Congress’s separation of the Smithsonian from executive agencies in select statutes is not determinative.

132. This statute “provide[s] procedures to protect the rights of certain government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.” 42 U.S.C. § 2000e-16a(b) (2006).

133. This statute prohibits age discrimination in employment for designated federal agencies. 29 U.S.C. § 633a(a) (2006).

134. *O’Rourke*, 399 F.3d at 121 (citing *Lane v. Pena*, 518 U.S. 187, 195 (1996)).

135. *Lane*, 518 U.S. at 192. The Court in *Lane* found that Congress did not waive the sovereign immunity of the United States Government for purposes of § 504(a) of the Rehabilitation Act of 1973. *Id.* at 200.

136. *Misra v. Smithsonian Astrophysical Observatory*, 248 F.3d 37, 39 (1st Cir. 2001) (“The Smithsonian is a federal agency which enjoys sovereign immunity from suit.”).

137. Congress thus satisfied the requirements of *Lane* for waiver of sovereign immunity. *See supra* note 135.

138. Workforce Investment Act of 1998, Pub. L. No. 105-220, § 341, 112 Stat. 936, 1092 (codified as amended in scattered sections of 5 U.S.C., 29 U.S.C., and 42 U.S.C.) (requiring the Smithsonian to comply with certain statutes, and therefore subjecting it to liability for violating those provisions).

139. *See O’Rourke*, 399 F.3d at 121 (noting that Congress’s exclusion of the Smithsonian from various statutes “does not reflect an affirmative conclusion by the courts that Congress meant not to include [the Smithsonian]” within the definition of executive agency). Significantly, Congress included the Smithsonian within applicable entities in the labor management laws of Title 5. Workforce Investment Act of 1998 § 341, 112 Stat. at 1092; *see* 5 U.S.C. § 7103(a)(3) (2006).

140. *See O’Rourke*, 399 F.3d at 121 (“[T]he Smithsonian became amenable to suit under employment discrimination laws such as Title VII and the Rehabilitation Act by virtue of the passage of the Workforce Investment Act of 1998.”); *Misra*, 248 F.3d at 39 (observing that the ambiguity of whether the Smithsonian enjoyed sovereign immunity “was resolved when Congress passed the Workforce Investment Act of 1998 . . . [because] Congress explicitly waived the Smithsonian’s sovereign immunity with respect to Title VII claims”).

B. The Smithsonian Is an Executive Agency

Despite the Smithsonian's self-identification,¹⁴¹ the *Dong* and *Dodge* courts' interpretation of the Institution under the Privacy Act,¹⁴² and the weak suggestion of the Workforce Investment Act,¹⁴³ considerable authority and evidence rightly suggest that the Smithsonian is an executive agency for purposes of Title 5.

1. Judicial Interpretation of the Freedom of Information Act Supports Defining the Smithsonian as an Executive Agency

In 1992, five years before the District of Columbia Circuit decided *Dong*, the United States District Court for the District of Columbia analyzed the application of FOIA¹⁴⁴ to the Smithsonian.¹⁴⁵ Notably, the Privacy Act, at issue in *Dong* and *Dodge*, derives its definition of "agency" from FOIA.¹⁴⁶ The *Dong* and *Dodge* courts found that the Smithsonian is not an agency under this definition;¹⁴⁷ the D.C. District Court, in *Cotton v. Adams*, held the opposite.¹⁴⁸

Although *Cotton* was impliedly overruled because the subsequent District of Columbia Circuit decision declined to define the Smithsonian as an executive agency under the same definition, the district court arguably was correct in its findings. In assessing whether the Smithsonian was an executive agency under FOIA, the *Cotton* court observed that "Congress amended the definition of 'agency' in § 552(f) of the FOIA in order to 'include those entities which may not be considered agencies under [the Administrative Procedure Act], but which perform governmental functions and control information of interest to the public.'"¹⁴⁹ Assessing the Smithsonian with this in mind, the district court

141. See *supra* Part I.C.

142. See *supra* Part I.C.

143. See *supra* Part I.E.

144. 5 U.S.C. § 552 (2006). FOIA outlines the documents and information agencies must disclose upon request. See *id.*

145. *Cotton v. Adams*, 798 F. Supp. 22, 24 (D.D.C. 1992).

146. 5 U.S.C. § 552a(a)(1) ("[T]he term 'agency' means agency as defined in section 552[(f)] of this title.").

147. See *Dong v. Smithsonian Inst.*, 125 F.3d 877, 879–80 (D.C. Cir. 1997); *Dodge v. Trs. of the Nat'l Gallery of Art*, 326 F. Supp. 2d 1, 11–12 (D.D.C. 2004).

148. See *Cotton*, 798 F. Supp. at 24 ("[T]he Smithsonian's structure reveals its status as an authority of the government properly subject to the FOIA.").

149. *Id.* (quoting H.R. REP. NO. 93-876, at 8 (1974)). The House Report quoted in *Cotton* explains that the expansion of FOIA was "to insure inclusion under the Act of Government corporations, Government controlled corporations, or *other establishments within the executive branch.*" H.R. REP. NO. 93-876, at 8 (emphasis added). The Administrative Procedure Act (APA) defines agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency" and lists a series of excluded entities. 5 U.S.C. § 551(1). Regarding the APA's definition of agency, OLC has commented that "[t]he Smithsonian performs none of the purely operational functions of government which have been given such significant weight in determinations of agency status in other cases." 12 Op. Off.

held that “[t]he Smithsonian is subject to the FOIA because it performs governmental functions as a center of scholarship and national museum responsible for the safekeeping and maintenance of national treasures.”¹⁵⁰ Additionally, the court pointed to characteristics of the Smithsonian that identify it as an agency subject to FOIA, namely

that the Smithsonian receives federal funds for many of its operations, that it is chartered by an Act of Congress, and that it has a majority of civil service employees . . . [and] that it receives representation from the United States Attorney, absolute governmental immunity in libel suits, and other benefits in property transfers.¹⁵¹

In holding that the Smithsonian is subject to the provisions of FOIA,¹⁵² the *Cotton* court impliedly acknowledged that the Institution is an “agency” for purposes of that Act.¹⁵³ As an agency subject to FOIA, the Smithsonian must be an “establishment in the executive branch of the Government” because it does not fit within the other categories of entities considered agencies under FOIA’s definition.¹⁵⁴

Legal Counsel 122, 124 (1988) (quoting Memorandum from Leon Ulman, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Peter Powers, Gen. Counsel, the Smithsonian Inst. 10 (Feb. 19, 1976)). As a result, the Smithsonian is not encompassed by the APA’s definition of agency, a determination that the *Cotton* court implies. *See Cotton*, 798 F. Supp. at 24.

150. *Cotton*, 798 F. Supp. at 24.

151. *Id.*

152. *Id.* (“The Smithsonian is subject to the FOIA because it performs governmental functions as a center of scholarship and national museum responsible for the safekeeping and maintenance of national treasures.”).

153. *See* 5 U.S.C. §552(f)(1) (2006) (“[A]gency’ as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency . . .”).

154. *Id.* The other categories are “any executive department, military department, Government corporation, Government controlled corporation, . . . or any independent regulatory agency.” *Id.* The Smithsonian is not an executive department, military department, Government corporation, or Government controlled corporation. *See supra* note 36. An independent regulatory agency is defined as “[a] federal agency, commission, or board that is not under the direction of the executive, such as the Federal Trade Commission or the National Labor Relations Board.” BLACK’S LAW DICTIONARY 71–72 (9th ed. 2009). Although the details of an independent regulatory agency are outside the scope of this Comment, one may assume that the Smithsonian is not an independent regulatory agency similar to the Federal Trade Commission because it is not empowered to, among other things, promulgate rules. *Cf.* 16 C.F.R. § 1.8 (2009) (“[T]he [Federal Trade] Commission is empowered to promulgate trade regulation rules.”). Because the Smithsonian lacks the power to promulgate rules and is not one of the other qualifying entities, the *Cotton* court likely interpreted the Smithsonian to be an “agency” by virtue of being an “other establishment in the executive branch.” *See Cotton*, 798 F. Supp. at 24; *see also* 5 U.S.C. § 552(f)(1).

2. Judicial Interpretation of the Federal Tort Claims Act Supports Defining the Smithsonian as an Independent Establishment

Analyzing the Smithsonian under decisions interpreting the Privacy Act and FOIA and applying that to the definition in 5 U.S.C. § 105 presents a glaring issue. Although the Privacy Act and FOIA are housed within Title 5, they contain internal definitions of “agency” and do not reference or otherwise employ the general definition of “agency” provided in Title 5.¹⁵⁵ Therefore, although persuasive, the *Dong* and *Dodge* decisions are not necessarily dispositive.

Nevertheless, the *Dodge* court, in holding that the Smithsonian is not an executive agency, made a significant observation that suggests the opposite conclusion.¹⁵⁶ The court cited the findings of the District of Columbia Circuit in *Expeditions Unlimited Aquatic Enterprises v. Smithsonian Institution*, which concluded that “the nature of [the Smithsonian’s] function as a national museum and center of scholarship, coupled with the substantial governmental role in funding and oversight, make the institution an ‘independent establishment of the United States,’ within the ‘federal agency’ definition” of the FTCA.¹⁵⁷ Similarly, the *Dong* court observed that the Smithsonian’s characteristics, including its federal charter, employment of federal civil-service employees, and federal immunity from taxes and libel actions, justify its being classified as an independent establishment subject to the FTCA.¹⁵⁸

Significantly, the FTCA includes in its definition of federal agency, “independent establishments of the United States.”¹⁵⁹ Neither the Act nor Title 28, however, defines independent establishment,¹⁶⁰ and unlike the Privacy Act and FOIA, the FTCA is part of Title 28, not Title 5.¹⁶¹ However, one may

155. See 5 U.S.C. §§ 105, 552, 552(a). The internal definitions in these statutes do not incorporate the Title 5 definition of “agency.” Cf. 49 U.S.C. § 32917(a) (2006) (“‘[E]xecutive agency’ has the same meaning given that term in section 105 of title 5.” (emphasis added)).

156. See *Dodge v. Trs. of the Nat’l Gallery of Art*, 326 F. Supp. 2d 1, 11 (D.D.C. 2004).

157. *Id.* (quoting *Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst.*, 566 F.2d 289, 296 (D.C. Cir. 1977)); see 28 U.S.C. § 2671 (2006) (“[T]he term ‘Federal agency’ includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.”).

158. *Dong v. Smithsonian Inst.*, 125 F.3d 877, 880 (D.C. Cir. 1997) (citing *Expeditions Unlimited Aquatic Enters., Inc.*, 566 F.2d at 296). The *Dong* court acknowledged that these characteristics “justified” classifying the Smithsonian as an ‘independent establishment of the United States’ for purposes of the [FTCA].” *Id.*

159. 28 U.S.C. § 2671.

160. See *id.*; see also *Scott v. Fed. Reserve Bank of Kan. City*, 406 F.3d 532, 535 (8th Cir. 2005) (“[T]he term ‘independent establishment’ is not defined within Title 28.”).

161. See 28 U.S.C. § 2671. In recognizing the Smithsonian as an executive agency under the FTCA, the *Dong* court noted that the FTCA “[defines] ‘Federal agency’ broadly to include ‘independent establishments of the United States,’” but also distinguished the definition of

infer that the term independent establishment means “an independent entity within the executive branch from other parts of the United States Code,” namely 5 U.S.C. § 104.¹⁶² Therefore, because the Smithsonian is an independent establishment for purposes of the FTCA,¹⁶³ it likely is an independent establishment for purposes of Title 5.

3. Analysis of the Property Act and Decisions by the Merit Systems Protection Board Support Defining the Smithsonian as an Executive Agency

In 1988, OLC determined that the Smithsonian was an independent establishment for purposes of the Property Act,¹⁶⁴ a Title 41 provision.¹⁶⁵ In so finding, OLC considered the internal definition of “agency” provided by the Act: “The term ‘executive agency’ means . . . an executive department or *independent establishment* in the executive branch of the Government”¹⁶⁶ After noting that the legislative history shed no light on the definition of “agency” and that the Smithsonian was not explicitly defined elsewhere, OLC turned to congressional action.¹⁶⁷ It reasoned that “the best evidence the Smithsonian is an ‘executive agency’ is that the Property Act repealed the Smithsonian’s prior statutory authority for certain property exchanges and replaced it with a provision applicable only to executive agencies.”¹⁶⁸ Thus, OLC concluded that Congress viewed the Smithsonian as an executive agency for purposes of the Property Act.¹⁶⁹

In addition to OLC’s opinion and the analyses of the D.C. Circuit and district courts, the MSPB¹⁷⁰ also determined that the Smithsonian was an

“agency” under the Privacy Act, borrowed from FOIA, which defines “agency” more narrowly. *Dong*, 125 F.3d at 883 (quoting 28 U.S.C. § 2671).

162. *Scott*, 406 F.3d at 535 (citing 5 U.S.C. § 104, which defines independent establishment); see also *Jones v. United States*, 17 Cl. Ct. 78, 82 (1989) (explaining that “[t]he term ‘executive department’ is not defined within Title 28, but section 451 defines ‘department’ by reference to the definition in Title 5 of the Code”).

163. See *Expeditions Unlimited Aquatic Enters., Inc.*, 566 F.2d at 296.

164. 12 Op. Off. Legal Counsel 122, 122 (1988).

165. 41 U.S.C. §§ 251–254b (2006). Because this is a Title 41 provision, definitions provided by Title 5 are not immediately applicable.

166. 40 U.S.C. § 102(4)(A) (2006) (emphasis added); see 12 Op. Off. Legal Counsel at 124–25.

167. 12 Op. Off. Legal Counsel at 125.

168. *Id.* at 126.

169. *Id.* at 127. Although the opinion makes clear that its determination is limited to the Property Act, the fact that Congress considered the Smithsonian an executive agency for this statute is relevant to the question at issue. See *id.* at 124. Moreover, President Harry S. Truman considered the Smithsonian an executive agency, which is evidenced by the fact that he included the Smithsonian as an addressee of a letter regarding the Property Act which was sent to all executive agencies. *Id.* at 127 n.6.

170. See 5 C.F.R. § 1201.1 (2009) (“The [MSPB] has two types of jurisdiction, original and appellate.”). Under its original jurisdiction, the MSPB hears cases about prohibited personnel

independent establishment for purposes of Title 5.¹⁷¹ In analyzing the Institution under 5 U.S.C. § 2302(a)(2)(C), which defines an “agency” as “an Executive agency and the Government Printing Office,”¹⁷² the MSPB found that “[t]he Smithsonian Institution is an ‘independent establishment,’” and therefore an executive agency subject to the statute.¹⁷³ In reaching this conclusion, the Board referenced the Institution’s charter, observing that it identifies the Smithsonian as an “establishment.”¹⁷⁴ It also considered a 1907 Attorney General Opinion that found the Institution “independent of any of the Executive Departments.”¹⁷⁵ Given this evidence, the MSPB determined that the Smithsonian is an independent establishment and, thus, subject to the statute.¹⁷⁶

4. The Fact that the Smithsonian Employs Persons Holding Positions in the Competitive Service Indicates the Institution Is Executive in Nature

Perhaps the most significant factor weighing in favor of the Smithsonian’s executive nature is the fact that it employs individuals holding positions in the competitive service.¹⁷⁷ The Smithsonian’s workforce “consists of 5,950 federal and non-federal employees, and over 5,000 volunteers,”¹⁷⁸ creating two distinct classes—federal civil-service employees and trust-fund employees.¹⁷⁹ The former are “paid from funds appropriated by the Congress directly to the Institution”; the latter, trust-fund employees, are “paid from trust funds and appointed under the provisions of trust fund personnel policies.”¹⁸⁰ Trust-fund

practices and political activity, persons removed from the Senior Executive Service due to poor performance, and penalties against administrative law judges. *Id.* § 1201.2(a)–(c).

171. *Pessa v. Smithsonian Inst.*, 60 M.S.P.R. 421, 425 (1994).

172. 5 U.S.C. § 2302(a)(2)(C) (2006) (excluding various entities from the definition of “agency,” but including government corporations that engage in prohibited personnel practices).

173. *Pessa*, 60 M.S.P.R. at 425; *see* *Seigla v. Smithsonian Inst.*, 62 M.S.P.R. 55, 57 n.1 (1994) (reiterating that, in *Pessa*, “the Board found that the Smithsonian was an ‘agency’ under 5 U.S.C. § 105”).

174. *Pessa*, 60 M.S.P.R. at 425 (citing 20 U.S.C. § 41 (2006)).

175. *Id.* (quoting 26 Op. Att’y Gen. 209, 214 (1907)).

176. *Id.*

177. Telephone Interview with Tom Lawrence, Human Res., Smithsonian Inst. (Jan. 19, 2010).

178. MANAGEMENT’S DISCUSSION, *supra* note 3, at 3.

179. *See* Smithsonian Inst., Career Center, How to Apply, http://www.sihr.si.edu/howto_apply.html (last visited Aug. 18, 2010) (“The Smithsonian employs individuals in Federal Civil Service and non-Federal (Trust) positions.”); *see also* *Misra v. Smithsonian Astrophysical Observatory*, 248 F.3d 37, 38 (1st Cir. 2001) (“Smithsonian employees are paid from one of two sources: federal funds or funds controlled by the Smithsonian Trust, a private entity.”); *Bisson v. Office of Pers. Mgmt.*, 908 F.2d 947, 950 (Fed. Cir. 1990) (noting that the Smithsonian distinguished between the private-roll and the federal-roll employees).

180. *Wolcott v. United States*, 43 Fed. Cl. 581, 582 (1999) (internal quotation omitted). In Fiscal Year 2007, sixty-two percent of the Smithsonian’s budget came from federal appropriations. FY 2007 BUDGET SOURCES, *supra* note 7. The remainder of its budget consisted of trust funds, which are “monies administered by the Smithsonian Institution other than those

employees and civil-service employees are mutually exclusive classes.¹⁸¹

“Most federal civil service employees are employed by way of either the ‘competitive service’ or the ‘excepted service.’”¹⁸² By definition, the competitive service includes “all civil service positions in the executive branch,” with limited exceptions.¹⁸³ Additionally, the competitive service consists of “civil service positions not in the executive branch which are *specifically included in the competitive service by statute*.”¹⁸⁴ Because no statute classifies civil-service positions at the Smithsonian in the competitive service, those Smithsonian employees holding positions within the competitive service must be part of the executive branch.¹⁸⁵ Therefore, the Smithsonian employs personnel who are within the executive branch, by virtue of their employment with the Institution. This suggests that the Smithsonian, as a whole, likely falls within the executive branch.

5. The Smithsonian’s Codification and the Constitutional Appointment Power Suggest that the Smithsonian Is Executive in Nature

Aside from recent interpretation and the nature of the Smithsonian’s current operation, the origins of the Institution suggest that it is executive in nature, despite the alternative argument.¹⁸⁶ Before its codification, Congress passed an Act on July 1, 1836, that authorized the President to appoint an agent to enforce the United States’ right to Smithson’s property.¹⁸⁷ Invoking its

made available as a result of an appropriation by the Congress of the United States directly to the Institution.” *Wolcott*, 43 Fed. Cl. at 582 (internal citation omitted).

181. See *Wolcott*, 43 Fed. Cl. at 585 (noting that the plaintiffs “were specifically appointed as trust fund employees and not as civil service employees”); *Bisson*, 908 F.2d at 950 (asserting that as a private-roll employee, the plaintiff was not part of the civil service).

182. *Gingery v. Dep’t of Def.*, 550 F.3d 1347, 1349 (Fed. Cir. 2008). The excepted service “consists of those civil service positions which are not in the competitive service or the Senior Executive Service.” 5 U.S.C. § 2103(a) (2006); see 5 C.F.R. § 213.101 (2009). All employees within the Federal Civil Service are therefore designated as holding positions in the competitive service, the excepted service, or the Senior Executive Service.

183. 5 U.S.C. § 2102(a)(1).

184. *Id.* § 2102(a)(2) (emphasis added).

185. See *id.* § 2102(a)(1)–(2) (stating that the competitive service includes all civil-service positions in the executive branch and all non-executive branch positions included in the competitive service by statute).

186. See *supra* Part I.A.

187. Act of July 1, 1836, ch. 252, § 1, 5 Stat. 64, 64 (conferring power on the President “to constitute and appoint an agent or agents, to assert and prosecute for and in behalf of the United States . . . the right of the United States to the legacy bequeathed to them by the last will and testament of James Smithson”); see 3 Op. Att’y Gen. 383, 384 (1838) (observing that Congress empowered the President to appoint an agent to receive James Smithson’s property). Under the Act, it is not likely that “prosecute” was used as commonly understood today, but rather meant “[t]o engage in; carry on.” BLACK’S LAW DICTIONARY 1341 (9th ed. 2009). Additionally, the Act authorized the President to empower the appointed agent(s) to provide funding for the

constitutional appointment power,¹⁸⁸ Congress gave the President the responsibility of choosing an agent, or an inferior officer,¹⁸⁹ to ensure the successful establishment of the Smithsonian. Although this action does not necessarily indicate that the appointed inferior officer is part of the executive branch,¹⁹⁰ that Congress delegated appointment authority to the President

establishment of the Institution. Act of July 1, 1836, ch. 252, § 1, 5 Stat. 64, 64. Therefore, Congress empowered the President to appoint and confer authority upon an agent. *Id.*

188. See U.S. CONST. art. II, § 2. The Appointments Clause of the United States Constitution provides two ways for officers to be appointed: by the President “with the advice and consent of the Senate,” or by congressional decision to vest the power of appointment “in the President alone, in the Courts of Law, or the Heads of Departments.” *Id.* The appointment method used is dictated by the nature of the appointee. The former appointment method concerns “Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for.” *Id.* The latter method applies to the appointment of inferior officers. *Id.* Because Congress provided the President with the power to designate an agent of the Smithsonian, it can be inferred that Congress considered this agent an inferior officer. See Act of July 1, 1836, ch. 252, § 1, 5 Stat. 64, 64.

189. Act of July 1, 1836, ch. 252, § 1, 5 Stat. 64, 64. There are two competing theories of what is meant by “inferior officer.” See Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 250 (2008). One theory views these officers as subordinate to a higher officer, and the other views them as less powerful, connoting the idea of being “petty or unimportant.” *Id.* In *Morrison v. Olson*, the Supreme Court espoused the latter view when considering whether the Attorney General’s appointment of independent counsel violated the Appointments Clause. *Morrison v. Olson*, 487 U.S. 654, 659–60 (1988). In concluding that the independent counsel was an inferior officer, the Court outlined four factors it considered: (1) whether the officer may be removed by a higher officer within the Executive Branch; (2) whether the officer may “perform only certain, limited duties”; (3) whether the officer has a limited jurisdiction; and (4) whether the officer’s tenure is limited. *Id.* at 671–72. The majority opinion ultimately held that the independent counsel was less powerful than the Attorney General, who was empowered to appoint her, and was therefore an inferior officer. *Id.* In his dissent, Justice Antonin Scalia rejected the majority’s understanding of an inferior officer, instead stating that the identifying characteristic of an inferior officer is that the person is subordinate to an officer in the Executive Branch. *Id.* at 719 (Scalia, J., dissenting); see also *Edmond v. United States*, 520 U.S. 651, 662 (1997) (“[T]he term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below the President: Whether one is an ‘inferior’ officer depends on whether he has a superior.”). Because Justice Scalia did not view the independent counsel as subordinate, he deemed her appointment unconstitutional. *Morrison*, 487 U.S. at 723 (Scalia, J., dissenting).

The agent of the Smithsonian likely qualified as an inferior officer under both views, being both less powerful and subordinate. The agent meets the *Morrison* factors because he was appointed to perform a specific task. See Act of July 1, 1836, ch. 252, § 1, 5 Stat. 64, 64. Additionally, although the agent did not have a designated superior, he was subordinate to the President because his task was to be carried out “for and in behalf of the United States.” Act of July 1, 1836, ch. 252, § 1, 5 Stat. 64, 64.

190. See *Morrison*, 487 U.S. at 673. The *Morrison* Court observed that “[i]t is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain.” *Id.* at 674 (quoting *Ex parte Siebold*, 100 U.S. 371, 397 (1879)). The Court noted, however, that the interbranch appointment of officers is not a constitutional requirement,

under the “excepting clause”¹⁹¹ and not to the heads of departments or the Judiciary,¹⁹² is certainly significant.

6. The Smithsonian Is Similar in Mission and Form to the National Archives and Records Administration, a Recognized Independent Establishment

The Smithsonian also likely qualifies as an executive agency because it performs functions similar to other recognized independent agencies in the executive branch, such as the National Archives and Records Administration (NARA).¹⁹³ The function of NARA is to “safeguard[] and preserve[] the records of our Government, ensuring that the people can discover, use, and learn from this documentary heritage.”¹⁹⁴ This is strikingly similar to the Smithsonian’s founding mission—“the increase and diffusion of knowledge among men”¹⁹⁵—and its function as a “steward to [the] nation’s historic, scientific, artistic, and cultural heritage.”¹⁹⁶

Other independent establishments perform wholly different functions, including regulation and policymaking.¹⁹⁷ Nothing, however, denotes that independent establishments engage in these functions.¹⁹⁸ Therefore, though

as the Appointments Clause gives Congress broad discretion in choosing in whom it will vest the power to appoint. *Id.* at 673.

191. The Excepting Clause “authorizes Congress to opt out of the default constitutional arrangement for appointment.” See Samahon, *supra* note 189, at 249. The clause provides that, with the exception of the appointment of Officers of the United States, “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments,” U.S. CONST. art. II, § 2, thus eliminating the Senate’s involvement in appointments. See Samahon, *supra* note 189, at 249.

192. See Act of July 1, 1836, ch. 252, § 1, 5 Stat. 64, 64.

193. See 44 U.S.C. § 2102 (2006) (“There shall be an independent establishment in the executive branch of the Government to be known as the National Archives and Records Administration.”); see also OFFICE OF THE FED. REGISTER, NAT’L ARCHIVES & RECORDS ADMIN., *supra* note 60, at 447 (“NARA was established as an independent agency in the executive branch of the Government by act of October 19, 1984 . . .”). Although Title 44 does not define independent establishment, other Titles of the Code may be helpful in defining the term. See 5 U.S.C. § 104 (2006) (defining independent establishment).

194. OFFICE OF THE FED. REGISTER, NAT’L ARCHIVES & RECORDS ADMIN., *supra* note 60, at 445; see 44 U.S.C. § 2109 (2006) (“The Archivist shall provide for the preservation, arrangement, repair and rehabilitation, duplication and reproduction . . . of records or other documentary material transferred to him . . .”).

195. 20 U.S.C. § 41 (2006).

196. MANAGEMENT’S DISCUSSION, *supra* note 3, at 1.

197. See OFFICE OF THE FED. REGISTER, NAT’L ARCHIVES & RECORDS ADMIN., *supra* note 60, at 380. For example, the Environmental Protection Agency was “created to permit coordinated and effective governmental action on behalf of the environment” and “designed to serve as the public’s advocate for a livable environment.” *Id.* Additionally, the Federal Labor Relations Authority, which is an independent establishment, was created “to consolidate the central policymaking functions in Federal labor-management relations.” *Id.* at 409.

198. See, e.g., 5 U.S.C. § 104 (2006). It is nowhere defined as necessary that independent establishments perform regulatory functions. This undercuts the *Dong* court’s reasoning that, because the Smithsonian “does not make binding rules of general application or determine rights

the Smithsonian may be distinguishable from independent establishments that perform regulatory and policymaking functions, it is not necessarily barred from being defined as an independent establishment in the executive branch. Moreover, that the Institution has a mission similar to statutorily defined independent establishments supports its characterization as such.

C. The Smithsonian Is an Independent Establishment

The Smithsonian's many characteristics,¹⁹⁹ along with its employment of persons within the competitive service,²⁰⁰ and its similarities to NARA²⁰¹ strongly suggest that the Smithsonian is an independent establishment as defined by 5 U.S.C. § 104. As a result, the Smithsonian conforms to the statutory definition of executive agency under Title 5 and all other provisions that borrow this definition.²⁰²

III. THE SMITHSONIAN'S STATUS AS AN INDEPENDENT ESTABLISHMENT AND AN EXECUTIVE AGENCY SUBJECTS IT TO CODE PROVISIONS AND EXECUTIVE ORDERS

The Smithsonian's identity as an executive agency, although providing clarity of purpose and identity, threatens the very existence of the Smithsonian Institution. The Smithsonian is a thriving establishment that captures the attention of millions annually²⁰³ and "offers the world a picture of America and America a picture of the world."²⁰⁴ It houses renowned artifacts such as the illustrious Hope Diamond, the Star Spangled Banner of Francis Scott Key's inspiring anthem, and the Wright brothers' original Flyer.²⁰⁵ In addition, the Smithsonian provides valuable research that spans disciplines and geographic locations.²⁰⁶

and duties through adjudication" and that it "issues no orders and performs no regulatory functions," it is not an executive agency. *See Dong v. Smithsonian Inst.*, 125 F.3d 877, 882 (D.C. Cir. 1997).

199. *See supra* Parts I.A, II.B.5.

200. *See supra* Part I.E (discussing the Smithsonian's employment of persons in the competitive service).

201. *See supra* Part I.B.6 (discussing the Smithsonian's similarities to NARA).

202. *See* 5 U.S.C. §§ 104–105 (2006) (defining independent establishments and including them in the list of entities encompassed in the term executive agency).

203. *See* MANAGEMENT'S DISCUSSION, *supra* note 3, at 1 ("More than 24 million people from across the country and around the world came to the Smithsonian during [fiscal year 2008], and almost 173 million more visited [the Smithsonian's] various websites."). In addition, the Smithsonian's fifty-eight traveling exhibits attracted approximately 5.15 million visitors. *Id.* app. B, at 1.

204. *Id.* at 1.

205. *Id.* app. B, at 4.

206. *Id.* app. B, at 6–7 (noting that the Smithsonian has been referred to as a "storehouse of ideas").

Given that the Institution is flourishing and is succeeding in its mission to “increase and [diffuse] knowledge among men”²⁰⁷—and has been since its codification—it may seem futile to defog the denotative uncertainty surrounding it. The implications of being an independent establishment, however, are significant.

Being an independent establishment subjects the Smithsonian to all Title 5 provisions that apply to executive agencies, as well as all statutes, regulations, and executive orders that incorporate Title 5’s definition.²⁰⁸

A. As an Executive Agency, the Smithsonian Is Subject to Provisions of the Hatch Act

As an executive agency, the Smithsonian must comply with the Hatch Act.²⁰⁹ The Hatch Act²¹⁰ is a Title 5 provision that restricts the political activity²¹¹ of federal employees, specifically those employed by an executive agency.²¹² Among its restrictions, an employee may not “use his official authority or influence” to impact election results,²¹³ solicit political contributions,²¹⁴ or be a candidate in a partisan election.²¹⁵ The Act resulted from congressional concern that federal employees would trade certain benefits that accompany public employment for personal and political gain.²¹⁶

207. 20 U.S.C. § 41 (2006).

208. See 5 U.S.C. §§ 104–105 (2006) (defining independent establishment and including it within the definition of executive agency). This Comment does not attempt to address the question of whether the Smithsonian is subject to FOIA, the FTCA, the Privacy Act, or the Property Act because these provisions define “agency” internally. See *supra* Part I.C–D. Rather, cases examining these statutes are used to explore the analysis courts use in determining the Smithsonian’s identity. See *supra* Part I.C–D.

209. See 5 U.S.C. § 7322(1)(A). Because the Hatch Act is a Title 5 provision and does not define executive agency internally, 5 U.S.C. § 105 provides the applicable definition.

210. 5 U.S.C. §§ 7321–7326. A separate series of Hatch Act provisions apply to state and local employees with duties in connection with federally funded activities. See *id.* §§ 1501–1508. Because of its scope in analyzing Smithsonian employees who are federal employees, this Comment focuses only on those Hatch Act provisions applicable to federal employees. See *id.* §§ 7321–7326.

211. *Id.* §§ 7323–7324, 7326 (discussing activity prohibited under the Hatch Act). “Political activity” is defined as “activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.” 5 C.F.R. § 734.101 (2009).

212. 5 U.S.C. § 7322(1)(A)–(B) (defining employee as “any individual, other than the President and the Vice President, employed or holding office in . . . an Executive agency other than the Government Accountability Office; [and] a position within the competitive service which is not in an Executive agency”).

213. *Id.* § 7323(a)(1).

214. *Id.* § 7323(a)(2).

215. *Id.* § 7323(a)(3).

216. Steven J. Eberhard, *The Need for the Hatch Act*, 1 HARV. J.L. & PUB. POL’Y 153, 188 (1978) (discussing the concern that “corrupt public employees would demand political favors in return for the benefits of the governmental programs they were charged with administering”).

Given that the Smithsonian is likely an independent establishment,²¹⁷ and therefore, an executive agency, employees of the Institution would be restricted by the Hatch Act,²¹⁸ which limits their ability to run for office and engage in political campaigns.²¹⁹

B. The Smithsonian Is Subject to Statutes that Employ Title 5's Definition of Executive Agency

Classifying the Smithsonian as an executive agency would also subject it to statutes outside of Title 5 that borrow the definition of executive agency from 5 U.S.C. § 105.²²⁰ For example, executive agencies must comply with a Title 49 provision that regulates vehicles used or purchased by executive agencies, and dictates the fuel standards that they must meet and maintain.²²¹ Furthermore, executive agencies are subject to a Title 42 statute relating to noise control and regulation.²²² The statute requires executive agencies to work with the Administrator of the Environmental Protection Agency to implement

217. See *supra* Part II.C.

218. Additionally, the Hatch Act specifically applies to persons holding positions in the competitive service. *Id.* § 7322(1)(B) (“‘[E]mployee’ means any individual, other than the President and the Vice President, employed or holding office in a position within the competitive service which is not in an Executive agency.”); see *supra* note 212. Therefore, at least those Smithsonian employees holding positions in the competitive service are subject to the provisions of the Hatch Act.

219. See 5 U.S.C. § 7323(a). The Office of Personnel Management has promulgated regulations that soften Hatch Act restrictions for federal employees living in certain municipalities. See 5 C.F.R. § 733.103 (2009). For example, although the general provisions prohibit employees from being candidates for partisan political office, 5 U.S.C. § 7323(a)(3), those employees living in designated localities may “[r]un as independent candidates for election to partisan political office in elections for local office in the municipality or political subdivision.” 5 C.F.R. § 733.103(b)(1). Additionally, though federal employees are banned from “solicit[ing], accept[ing] or receiv[ing] a political contribution,” 5 U.S.C. § 7323(a)(2), subject, of course, to certain exceptions, see 5 U.S.C. § 7323(a)(2)(A)–(C), those employees living in designated areas may act “as, or on behalf of, an independent candidate for partisan political office in elections for local office in the municipality or political subdivision.” 5 C.F.R. § 733.103(b)(2). Moreover, designated municipalities exempt from some Hatch Act restrictions include the Washington, D.C. suburbs of Bethesda, Maryland; College Park, Maryland; Arlington County, Virginia; and Alexandria, Virginia. *Id.* § 733.107. Employees living in these municipalities remain restricted, albeit not as stringently, from engaging in certain political activity. See *id.*

220. See *infra* notes 221–26 and accompanying text.

221. 49 U.S.C. § 32917 (2006). The provision requires that “[t]he President shall prescribe regulations that require passenger automobiles leased for at least 60 consecutive days or bought by executive agencies in a fiscal year to achieve a fleet of average fuel economy . . . for that year of at least the greater of . . . 18 miles a gallon” or the standard set forth for the model year. *Id.* § 32917(b) (emphasis added). Under § 32917, “‘executive agency’ has the same meaning given that term in section 105 of title 5.” *Id.* § 32917(a) (emphasis added).

222. 42 U.S.C. § 4903 (2006). Notably, this statute provides that “[t]he term ‘Federal agency’ means an executive agency (as defined in section 105 of Title 5).” See *id.* § 4902(10) (emphasis added).

“standards or regulations respecting noise”²²³ and install programs “relating to noise research and noise control.”²²⁴

Moreover, executive agencies must comply with Title 31 regulations concerning “conditions under which [the agencies] . . . may accept payment, or authorize an employee of such agency to accept payment on the agency’s behalf, from non-Federal sources for travel.”²²⁵ This likewise extends to activities connected with any meetings or similar events that an employee may attend as a result of his official duties.²²⁶

C. As an Executive Agency, the Smithsonian Is Subject to Applicable Executive Orders

Classification as an executive agency does not only subject the Smithsonian to various statutes, but also mandates that it follow Executive Orders applicable to executive agencies.²²⁷

223. *Id.* § 4903(c)(2). Once the agency implements these standards, the Administrator of the Environmental Protection Agency is responsible for ensuring that such programs and initiatives are followed. *Id.* (explaining that “[i]f at any time the Administrator has reason to believe that a standard or regulation, or any proposed standard or regulation, of any Federal agency respecting noise does not protect the public health and welfare to the extent he believes to be required and feasible” he may ask the agency to provide a report assessing potential changes to established standards that would achieve this goal). The statute also dictates how the Administrator’s responsibility is executed, requiring publishing requests for agency compliance and the agency’s statements of review in the Federal Register. *Id.* As an executive agency, the Smithsonian would be subject to review by the Environmental Protection Agency for noise control compliance.

224. *Id.* § 4903(c)(1).

225. 31 U.S.C. § 1353(a) (2006); *see id.* § 1353(c)(1) (adopting the Title 5 definition of executive agency). Compliance with this statute may be especially significant for the Smithsonian because part of its budget comes from trust-fund monies, which are non-Federal dollars. *See supra* note 180 and accompanying text. In addition, Smithsonian employees likely are governed by this statute because some employees engage in work-related travel. *See, e.g.,* *Dong v. Smithsonian Inst.*, 125 F.3d 877, 877 (D.C. Cir. 1997) (finding that a Hirshorn Museum employee was required to travel by virtue of her position with the Smithsonian because “her duties include[d] serving as a courier for works of art the Hirshorn lends to other museums”).

226. 31 U.S.C. § 1353(a).

227. *See infra* notes 228–33 and accompanying text. Executive orders have been called “a venerable category of presidential directives.” PATTERSON, *supra* note 51, at 274. These directives typically are aimed at the federal government, *id.*, and range from those that alter the history of the nation to those that establish presidential advisory commissions. *Compare* Exec. Order No. 9066, 3 C.F.R. 1092, 1092–93 (1938–1943) (authorizing the establishment of internment camps during World War II), *with* Exec. Order No. 13,090, 63 Fed. Reg. 36,151, 36,151 (July 2, 1998) (establishing the President’s Commission on the Celebration of Women in American History under the Clinton Administration), *revoked by* Exec. Order No. 13,225, 3 C.F.R. 791 (2002). An executive order typically specifies its statutory authority, PATTERSON, *supra* note 51, at 274, and then provides entities to which it will apply definitions of terms contained therein, and action to be executed. *See, e.g.,* Exec. Order No. 13,513, 74 Fed. Reg. 51,225, 51,225–26 (Oct. 6, 2009); Exec. Order No. 13,186, 66 Fed. Reg. 3853, 3853–55 (Jan. 17, 2001).

On October 5, 2009, President Barack Obama issued Executive Order 13,514, mandating that federal agencies perform a variety of tasks in an effort “to create a clean energy economy.”²²⁸ The order lists very specific goals for agencies, including “reducing potable water consumption intensity by 2 percent annually through fiscal year 2020.”²²⁹ The Order specifies that it applies to “executive agenc[ies] as defined in *section 105 of title 5*.”²³⁰

Executive Order 13,513 similarly defines agency.²³¹ This directive calls for “[a]ll agencies of the executive branch” to implement initiatives aimed at prohibiting employees from sending text messages while driving.²³² Although this may be a simple directive, it is nonetheless worth acknowledging that Executive Orders that apply generally to executive agencies as defined in 5 U.S.C. § 105 also apply to the Smithsonian as an executive agency.²³³

D. Congress Should Tread Carefully in Treating the Smithsonian as an Independent Establishment

The ramifications of the Smithsonian’s characterization as an independent establishment and, thereby, an executive agency, are far from slight. The several examples listed above of various statutes and directives with which the Smithsonian must comply, given its status as an executive agency, impose strict standards and mandates.²³⁴ Although some of these may be less intrusive than others, such as the prohibition on employee text messaging,²³⁵ the implications of 31 U.S.C. § 1353, outlining provisions concerning the acceptance of non-federal funds for employee travel,²³⁶ and Executive Order 13,514, detailing energy-related mandates,²³⁷ are far more demanding. Additionally, the limitations of the Hatch Act affect the type of employee the

228. Exec. Order No. 13,514, 74 Fed. Reg. 52,117, 52,117 (Oct. 8, 2009).

229. *Id.* at 52,118. The Order requires that the head of each agency “divert[] at least 50 percent of non-hazardous solid waste, excluding construction and demolition debris, by the end of fiscal year 2015.” *Id.*

230. *Id.* at 52,125 (emphasis added).

231. Exec. Order No. 13,513, 74 Fed. Reg. 51,225, 51,226 (Oct. 6, 2009) (“The term ‘agency’ as used in this order means an executive agency, as defined in 5 U.S.C. [§] 105.” (emphasis added)).

232. *Id.* at 51,225. The Executive Order specifically requires that “[f]ederal employees shall not engage in text messaging (a) when driving [government-owned, government-leased, or Government-rented vehicles], or when driving [privately-owned vehicles] while on official Government business, or (b) when using electronic equipment supplied by the Government while driving.” *Id.*

233. The President, however, may exclude entities from an Executive Order’s reach. *See, e.g.*, Exec. Order No. 13,186, 66 Fed. Reg. 3853, 3853 (Jan. 17, 2001) (specifically excluding independent establishments from the definition of federal agency in an Order regulating protection for migratory birds).

234. *See supra* Parts III.A, III.B.

235. *See supra* note 232 and accompanying text.

236. *See supra* notes 225–26 and accompanying text.

237. *See supra* notes 228–30 and accompanying text.

Smithsonian may hire.²³⁸ Restrictions on political activity, especially in the nation's capital, may deter some from considering employment at the Institution.

Following nuanced orders and directives, as well as personnel provisions, could alter the nature of the Smithsonian and subject it to executive and congressional control.²³⁹ Although this would eliminate divergent opinions and convoluted analysis in judicial decisions, this clarity may not be an advantage worth having.

This Comment consistently emphasized the unique nature of the Smithsonian Institution and its treasured place in American culture.²⁴⁰ It serves as a storehouse, a research center, a teaching tool, a window into varied cultures, and, most significantly, a source of American pride. Accordingly, the Institution should be treated as an independent establishment, but in the colloquial sense of the term, separate from the workings of government.²⁴¹

Congress, therefore, should consider defining the Smithsonian consistently. It is widely confusing to subject the Institution explicitly to certain statutes, implicitly exclude it from others, and leave the rest up to judicial interpretation.²⁴² Moreover, the Smithsonian's designation as an executive agency may prove damaging and detract from its mission. If Congress is interested in preserving the unique place the Smithsonian holds in the United States, and in the world, it should explicitly define the Institution as something wholly other. Correspondingly, Congress should promulgate a set of provisions, in addition to the Smithsonian's original charter, to govern its existence in today's era of regulation and oversight.

IV. CONCLUSION

Despite convoluted case law and conflicting statutory interpretations, it is clear that the Smithsonian should be considered an executive agency given the definition provided by Title 5. So denoted, the statutes and directives with which the Institution must comply would be more clearly apparent to courts, Congress, and the Smithsonian alike.

Although it would enjoy clarity of purpose and statutory identity, extraneous regulation and onerous directives may threaten the Institution's place in American society. Accordingly, Congress should establish a means of oversight and regulation that provides appropriate directives to promote the purpose and unique nature of America's beloved institution.

238. See *supra* notes 218–19 and accompanying text.

239. See discussion *supra* Part III.A–C.

240. See *supra* notes 1–6 and accompanying text.

241. The Smithsonian should not be classified as an independent establishment as the term is defined in 5 U.S.C. § 104. Rather, it should be considered wholly separate from the government, and, therefore, subject to different regulations and provisions supporting its unique mission.

242. See *supra* Part I.C–D.

